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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

State of California, *et al.*,
Plaintiffs,
v.
Andrew Wheeler, *et al.*,
Defendants.

Case No. 3:20-cv-3005-RS

**STATE INTERVENORS' NOTICE
OF MOTION AND MOTION TO
INTERVENE IN SUPPORT OF
DEFENDANTS**

Hr'g Date: July 9, 2020
Hr'g Time: 1:30pm
Dep't: San Francisco Courthouse,
Courtroom 3, 17th Floor
Judge: Honorable Richard Seeborg
Action Filed: May 1, 2020

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NOTICE OF MOTION

Pursuant to Local Rule 7-1(b) and consistent with this Court’s May 27, 2020 Order Regarding Motions to Intervene and Motions for Leave to Submit Amicus Briefs (Doc. 80), the States of Georgia, West Virginia, Alabama, Alaska, Arkansas, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming (“State Intervenors”) respectfully request leave to submit without oral argument this Motion to Intervene in Support of Defendants in the above-captioned case.

In the alternative, the State Intervenors notice that on July 9, 2020, at 1:30pm, or as soon as this matter may be heard before the Honorable Richard Seeborg in the above-titled Court, located at the San Francisco Courthouse, Courtroom 3, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102, the State Intervenors will, and hereby do, move for the same relief.

The State Intervenors hereby move for leave to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, permissively under Federal Rule of Civil Procedure 24(b).

The State Intervenors submit in support this notice of motion and accompanying motion to intervene in support of defendants; proposed opposition to plaintiffs’ motion for preliminary injunction; and proposed answer. The State Intervenors consulted with counsel for the plaintiffs and the defendants; the defendants take no position and the plaintiffs reserve the right to oppose.

MOTION AND MEMORANDUM TO INTERVENE IN SUPPORT OF DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 24(a)(2), the State Intervenors respectfully move to intervene in support of Defendants in this action concerning “The Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328). In the alternative, the State Intervenors move for leave to intervene pursuant to Federal Rule of Civil Procedure 24(c).

BACKGROUND

A. Statutory Background

The statutory term “waters of the United States” limits the geographic reach of federal regulatory jurisdiction under the Clean Water Act. Most notably, the Act’s key permitting programs for discharges of pollutants, 33 U.S.C. § 1342 (section 402), and “dredged or fill material,” *id.* § 1344 (section 404), require permits for discharges into “navigable waters,” which the Act defines as “the waters of the United States, including the territorial seas,” *Id.* § 1362(7). And the Act requires states to develop water quality standards—which designate the use for which a given body of water is to be protected, and then set criteria that must be met to safely allow that use—for “waters of the United States” within their borders. *See id.* § 1313. For farmers, developers, homeowners, and landowners, whether their land includes a feature covered under the Act determines whether they must first obtain a federal permit—a process that can take years and often costs tens or hundreds of thousands of dollars—to develop or use their property. *See Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality op.) (citing 33 U.S.C. §§ 1362(12), 1362(6)). And unauthorized discharges can subject an individual to fines and other civil or criminal penalties. 33 U.S.C. §§ 1311(a), (f), 1319, 1365.

Recent Supreme Court decisions addressing the agencies’ attempts to define the “waters of the United States” subject to federal jurisdiction have rebuffed them as too expansive. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 174 (2001) (rejecting assertion of federal jurisdiction over isolated ponds based on mere ecological connection to jurisdictional waters); *Rapanos*, 547 U.S. at 739, 742 (plurality op.) (rejecting assertion of jurisdictions beyond “relatively permanent, standing or continuously flowing bodies of water” and “wetlands with a continuous surface connection to” those waters); *id.* at 776 (Kennedy, J., concurring) (rejecting assertion of jurisdiction over all “wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)”).

B. The 2015 Rule.

In June 2015, the agencies issued a final rule defining “waters of the United States.” 80 Fed. Reg. at 37,054 (June 29, 2015) (2015 Rule). Many of the State Intervenor, among others,

1 challenged that rule as contrary to the CWA, the Administrative Procedure Act, and the
 2 Constitution. Reflecting the strength of these challenges, the rule was enjoined—and in some
 3 cases, declared unlawful—by multiple federal courts. *See, e.g., Georgia v. Wheeler*, 418 F. Supp.
 4 3d 1336, 1383 (S.D. Ga. 2019); *North Dakota, et al. v. EPA, et al.*, 127 F. Supp. 3d 1047 (D.
 5 N.D. 2015); Order, *Texas v. EPA*, Case No. 3:15-cv-162 (S.D. Tex. Sept. 12, 2018) (Doc. 140).

6 While this litigation was ongoing, the President issued an Executive Order in early 2017
 7 directing the agencies to review the prior rule. Exec. Order No. 13778, 82 Fed. Reg. 12,497 (Feb.
 8 28, 2017). The federal agencies ultimately approached this goal in two steps: (1) rescinding the
 9 old rule and re-codifying the pre-existing rules, then (2) issuing a new rule defining “waters of
 10 the United States” consistent with the CWA and its underlying cooperative federalism
 11 framework. *See, e.g., Definition of “Waters of the United States”—Recodification of Pre-*
 12 *Existing Rules*, 82 Fed. Reg. 34,899 (July 17, 2017). Many of the State Intervenors submitted
 13 comments in support of these proposed actions. *See, e.g., State of West Virginia et al., Comments*
 14 *On The Proposed Rule Entitled Revised Definition of “Waters of the United States,”* 84 Fed.
 15 Reg. 4154 (Feb. 14, 2019) (joined by West Virginia, Alabama, Arkansas, Georgia, Idaho,
 16 Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina,
 17 Tennessee, Texas, and Utah).

18 **C. The 2020 Rule**

19 In October 2019, the Environmental Protection Agency and Army Corps of Engineers (“the
 20 agencies”) published a final rule repealing the 2015 Clean Water Rule. *Definition of “Waters of*
 21 *the United States”—Recodification of Pre-existing Rules*, 84 Fed. Reg. 56,626 (Oct. 22, 2019).
 22 The agencies then published a second rule formally clarifying the definition of “waters of the
 23 United States” under the Clean Water Act. *See The Navigable Waters Protection Rule: Definition*
 24 *of “Waters of the United States,”* 85 Fed. Reg. 22,250 (Apr. 21, 2020) (to be codified at 33
 25 C.F.R. 328) (“2020 Rule”). In the 2020 Rule, the agencies concluded that the 2015 rule did not
 26 reflect the CWA’s proper legal limits and adopted, instead, an approach that largely tracks Justice
 27 Scalia’s plurality opinion in *Rapanos. Id.* at 22,265. The agencies also recognized that it was
 28

1 inappropriate to push the statute’s jurisdictional limits without a clear statement from Congress
2 authorizing the encroachment into traditional state prerogatives. *Id.* at 22,260, 22,272.

3 On May 1, 2020, the plaintiffs filed this action challenging the 2020 Rule, seeking
4 declaratory and injunctive relief. Doc. 1. The plaintiffs argued that the agencies acted arbitrarily
5 and capriciously in repealing the 2015 rule and asked this Court to vacate and set aside the 2020
6 Rule. *Id.* at 21, 22. On May 18, 2020, the plaintiffs moved for a nationwide preliminary
7 injunction. Doc. 30.

8 INTERESTS AND GROUNDS FOR INTERVENTION

9 Intervention should be permitted as of right because the State Intervenors “claim[] an
10 interest relating to the property or transaction that is the subject of the action, and [are] so
11 situated that disposing of the action may as a practical matter impair or impede the [State
12 Intervenors’] ability to protect [their] interest,” and “existing parties [do not] adequately
13 represent that interest.” Fed. R. Civ. P. 24(a)(2). The Ninth Circuit has interpreted this standard as
14 requiring State Intervenors to show that: (1) “the application is timely”; (2) they have “a
15 significant protectable interest relating to the . . . subject of the action”; (3) the action may
16 “impede or impair” their ability to protect their interests; and (4) existing parties “may not
17 adequately represent . . . [their] interests.” *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007).
18 The State Intervenors easily fulfill all four of these factors.

19 A. The application is timely.

20 The Rules of Civil Procedure do not set a deadline for intervention, but plaintiffs filed their
21 complaint on May 1, 2020, and the State Intervenors are filing this motion just 31 days after that
22 date and before any the federal defendants have filed any answer or responsive pleading. Perhaps
23 more relevant, this motion is being filed just 14 days after plaintiffs filed a motion for a
24 preliminary injunction seeking nationwide relief—a remedy that would have significant
25 consequences for all States. Intervention at this early stage also would not delay this action as the
26 State Intervenors are simultaneously filing an answer and proposed response to plaintiffs’ motion
27 for preliminary injunction.
28

B. The State Intervenor has a significant protectable interest in ensuring the proper interpretation of the federal government's jurisdiction over their sovereign lands and waters.

The State Intervenor has clear and substantial protectable interests at stake in this action. The “property” that is the subject of this action, particularly given the plaintiffs’ request for nationwide relief, includes the sovereign lands and waters within the State Intervenor’s borders that is potentially subject to federal jurisdiction under the CWA. *Day*, 505 F.3d at 965. Further, the “regulation of land use” that is the consequence of deeming waters “waters of the United States” is a “quintessential state and local power.” *Rapanos*, 547 U.S. at 738 (plurality op.); *see also* 33 U.S.C. § 1251(b). It follows that regulating and protecting intrastate waters is an important element of state sovereignty. *Tarrant Reg’l Water Dist. v. Hermann*, 569 U.S. 614, 632 (2013) (citing *United States v. Alaska*, 521 U.S. 1, 5 (1997)). These interests are at the heart of this action, which seeks to expand the scope of federal regulatory jurisdiction over the States’ lands and waters.

Moreover, the scope of the term “waters of the United States” does not just set federal jurisdiction over waters within the States: it sets the scope of the States’ responsibilities under the CWA. That Act was built on a cooperative federalism framework. Congress enacted the CWA with a policy to “recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution” and to “plan the development and use ... of land and water resources.” 33 U.S.C. § 1251(b). And as contemplated by the Act, the large majority of states have assumed authority to administer the CWA’s core permitting regime, *see* U.S. Env’tl. Protection Agency, *NPDES Program Authorizations* (July 2019), available at https://www.epa.gov/sites/production/files/2020-04/documents/npdes_authorized_states_2020_map.pdf. The States are also required to issue water-quality certifications for every federal permit issued within their borders. *See* 33 U.S.C. § 1341(a). The scope of those programs depends on what counts as “waters of the United States,” and the scope of that term thus determines what regulatory duties and costs the States must absorb.

1 These substantial effects of the definition of “waters of the United States” on the State
 2 Intervenor’s interests drove their efforts to challenge the 2015 Rule, which attempted to render
 3 the “vast majority of the nation’s water features” subject to federal jurisdiction. U.S. EPA &
 4 Department of the Army, *Economic Analysis of the EPA-Army Clean Water* at 11 (May 20, 2015)
 5 (Docket ID: EPA-HQ-OW-2011-0880-20866), [https://www.regulations.gov/document?D=EPA-](https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866)
 6 HQ-OW-2011-0880-20866. This kind of encroachment on the States’ sovereign power to
 7 regulate their water resources lacked statutory or even constitutional justification. *See, e.g.,*
 8 *Hodel v. Va. Surface Mining & Reclamation Ass’n Inc.*, 452 U.S. 264, 286-87 (1981) (explaining
 9 that a federal rule violates States’ Tenth Amendment powers when it addresses matters that are
 10 indisputably attributes of state sovereignty, and when compliance with the rule would directly
 11 impair States’ ability to structure integral operations); *see also, e.g., Kansas v. United States*, 249
 12 F.3d 1213, 1227 (10th Cir. 2001). The 2020 Rule, by contrast, better respects the States’
 13 traditional regulatory authority over their lands and waters by returning federal regulators to their
 14 appropriate lane. The State Intervenor’s thus have substantial interests that are threatened by the
 15 plaintiffs’ action, which seeks to re-impose expansive federal jurisdiction in this area of
 16 traditional state authority. If the plaintiffs have interests in this action, the State Intervenor’s
 17 undoubtedly have a protectable interest, too.

18 **C. The disposition of this action could impede the State Intervenor’s ability to**
 19 **protect their interests.**

20 The risk this action poses to the State Intervenor’s interests is readily apparent. Many of the
 21 State Intervenor’s challenged the 2015 Rule because its expansive assertion of jurisdiction
 22 threatened to saddle them and their citizens with substantial costs and infringed their traditional
 23 sovereign authority over their lands and waters. *See Order, North Dakota v. U.S. Env’tl. Prot.*
 24 *Agency*, Case No. 3:15-cv-59 (N.D. Aug. 27, 2015 (ECF No. 70) (enjoining 2015 Rule in Alaska,
 25 Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North
 26 Dakota, South Dakota, and Wyoming); *Order, Georgia v. McCarthy*, Case No. 2:15-cv-79 (S.D.
 27 Ga. June 8, 2018) (ECF No. 174) (enjoining the 2015 Rule in Alabama, Florida, Georgia,
 28 Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and

Wisconsin); Order, *Texas v. EPA*, Case No. 3:15-cv-162 (S.D. Tex. Sept. 12, 2018) (ECF No. 140) (enjoining the 2015 Rule in Louisiana, Mississippi, and Texas). And many of the State Intervenor also supported and continue to support the agencies’ promulgation of the 2020 Rule as a necessary and important clarification of federal jurisdiction over their sovereign lands and waters. *See* 84 Fed. Reg. 4154; Macy Decl. ¶ 8; Parfitt Decl. ¶ 3; Singletary Decl. ¶ 4; Swonke Decl. ¶¶ 7–8. Now, the plaintiffs challenge the 2020 Rule as “arbitrary, capricious, and not in accordance with law” and seek to have it set aside and vacated. Doc. 1, at 24. Further, and most pressing, the plaintiffs seek universal injunctive relief in their motion for a preliminary injunction. If the plaintiffs secure their requested relief, the consequences will extend to the State Intervenor, too, even though they support implementation of the 2020 Rule and strongly oppose the plaintiffs’ requested “relief.” *See, e.g., Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (explaining that the “prospect of significant interference with ... self-government” weighs against injunctive relief); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001). And aside from intervening in this case to defend against that challenge, there is no other ready recourse for the State Intervenor to combat an injunction issued by this Court that applies within their geographic boundaries.

D. The existing parties will not adequately represent the interests of the State Intervenor.

Unlike the plaintiffs, the State Intervenor believe the 2020 Rule strikes a reasonable balance between the roles of federal regulators and the States in protecting land and water resources. The State Intervenor view the 2020 Rule as a substantial improvement over the prior rule. The new rule builds on Justice Scalia’s plurality opinion in *Rapanos*, 85 Fed. Reg. at 22314, which the State Intervenor will argue best comports with the text and purposes of the CWA—and at a minimum avoids serious constitutional concerns. *Rapanos*, 547 U.S. at 737-38 (plurality op.). The 2020 Rule’s approach also preserves the longstanding role of the States as primary regulators of intrastate lands and waters by allowing for federal jurisdiction over only relatively permanent bodies of water, and leaving within state control those areas that benefit the most

1 from regulation according to “local policies ‘more sensitive to the diverse needs of a
2 heterogeneous society.’” *Bond v. United States*, 564 U.S. 211, 221 (2011). The Court should hear
3 from States on both sides of the issue before ruling on this important question.

4 The defendants—officials and agencies of the federal government—will not adequately
5 represent the State Intervenor’s interests, either. Although the defendants will also urge the Court
6 to reject the Complaint, their rationale could differ substantively from the bases the State
7 Intervenor’s intend to advance. The State Intervenor’s interests could also differ from those of the
8 agencies when it comes to proper interpretation of the CWA’s cooperative federalism
9 framework, for example. The defendants also cannot respond to the plaintiffs’ arguments in the
10 same manner that the State Intervenor’s can: as same-level sovereigns in our federal form of
11 government. Further, the State Intervenor’s will be able to explain their own regulatory programs
12 better than other litigants. And if the Court holds that the 2020 Rule is unlawful, the plaintiffs
13 may seek a remedy that would increase the federal defendants’ power and impose irreparable
14 economic harms on the State Intervenor’s. Given this dynamic, the State Intervenor’s interests are
15 not adequately represented by any of the existing parties.

16 **E. In the alternative, the Court should permit intervention under Rule 24(b).**

17 Finally, in the event this Court does not grant intervention as a matter of right, the Court
18 should permit the State Intervenor’s to intervene in this matter pursuant to Federal Rule of Civil
19 Procedure 24(b)(1)(B), which provides: “On timely motion, the court may permit anyone to
20 intervene who ... has a claim or defense with the main action a common question of law or fact.”
21 The State Intervenor’s motion is timely and will not delay these proceedings, as explained above.
22 Moreover, their position in support of the 2020 Rule plainly involves common questions of law
23 and fact with this action. Their direct opposition to plaintiffs’ claims satisfies the “common
24 question” requirement for permissive intervention. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d
25 1094, 1110 (9th Cir. 2002). The State Intervenor’s therefore satisfy the requirements for
26 permissive intervention to protect their important interests in this case.

CONCLUSION

For the reasons stated above, the State Intervenors request that the Court grant their motion to intervene as of right, or, in the alternative, grant leave for State Intervenors to intervene.

Respectfully submitted.

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*Application for Admission Pro Hac Vice Pending or Forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, I served this motion to intervene in support of defendants by filing it with this Court's ECF system.

/s/ Andrew A. Pinson
Andrew A. Pinson